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No.

Supreme Court, U.S.

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC. AND  
LECOMTE'S DAIRY, INC.,  
*Petitioners,*

v.

GREGORY WATSON, COMMISSIONER OF MASSACHUSETTS  
DEPARTMENT OF FOOD AND AGRICULTURE,  
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
MASSACHUSETTS SUPREME JUDICIAL COURT

**PETITION FOR WRIT OF CERTIORARI**

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86 pp

**QUESTIONS PRESENTED FOR REVIEW**

I. Does a state law requiring milk wholesalers to pay an "assessment" on all milk sold within the state, including milk produced out-of-state, and which provides that all assessments collected are then to be paid over to in-state producers only, despite the fact that most milk sold within the state is produced outside the state, violate the Commerce Clause of the United States Constitution within the meaning of this Court's decision in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)?

II. Does the burden imposed on interstate commerce by a state law which requires milk wholesalers to pay an "assessment" on all milk sold within the state, including milk produced out-of-state, and which provides that all assessments collected are then to be paid over to in-state producers only, outweigh the law's benefit of protecting local dairy farmers, within the meaning of this Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)?

## LIST OF PARTIES.

The Petitioners are West Lynn Creamery, Inc. and LeComte's Dairy, Inc.<sup>1</sup> The respondent is Gregory Watson, the Commissioner of the Massachusetts Department of Food and Agriculture.

<sup>1</sup> Pursuant to Supreme Court Rule 29.1, the petitioner West Lynn Creamery, Inc. states that it is a privately held corporation with no subsidiaries. West Lynn Creamery, Inc. is wholly-owned by Scangas Brothers Holdings, Inc. Scangas Brothers Holdings, Inc. also wholly-owns Richdale Stores, Inc. and West Lynn Creamery Realty Corp.

The petitioner LeComte's Dairy, Inc. is a privately held corporation with no parent companies, subsidiaries, or affiliated corporations.

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**PETITION FOR WRIT OF CERTIORARI**

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The Petitioners, West Lynn Creamery, Inc. ("West Lynn") and LeComte's Dairy, Inc. ("LeComte's"), respectfully pray that a writ of certiorari issue to review the Opinion of the Massachusetts Supreme Judicial Court entered in the above entitled case on April 15, 1993.

## OPINIONS BELOW

The Opinion of the Massachusetts Supreme Judicial Court is reported at 415 Mass. 8, 611 N.E.2d 239 (1993) and is reprinted in Appendix A to this Petition at A-1.<sup>2</sup> The Order of the Massachusetts Supreme Judicial Court staying the issuance of its rescript pending this Court's determination of the constitutionality of a pricing order is unreported and is reprinted in Appendix B to this Petition at A-15. The Order of the Massachusetts Appeals Court enjoining the Commissioner from revoking the Petitioners' milk dealers' licenses is unreported and is reprinted at A-17. The opinion of the Massachusetts Superior Court denying the Petitioners' Second Motion for a Preliminary Injunction is unreported and is reprinted at A-22. The Amendment to the Opinion of the Massachusetts Superior Court denying the Petitioners' Second Motion for a Preliminary Injunction is unreported and is reprinted at A-25. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking West Lynn's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at A-27. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking LeComte's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at A-34.

## JURISDICTION

The Opinion of the Massachusetts Supreme Judicial Court, the highest state court in Massachusetts, was entered on April 15, 1993. The Massachusetts Supreme Judicial Court held that a milk pricing order, issued by the Commissioner of the Massa-

<sup>2</sup> Citations to material printed in the Appendices appear as "A-\_\_\_\_."

chusetts Department of Food and Agriculture, did not violate the Commerce Clause of the United States Constitution. No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Article 1, Section 8 of the Constitution of the United States provides in pertinent part as follows:

The Congress shall have the Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

The Amended Pricing Order issued by the Commissioner of the Massachusetts Department of Food and Agriculture is reprinted at Appendix C to this Petition at A-41.

## STATEMENT OF THE CASE

Tension between various states regarding the pricing and marketing of milk in the United States has surfaced periodically since at least the 1930's. The issue presented by this case arises because another state, this time Massachusetts, seeks to protect its dairy farmers from competition in the interstate market for milk, at the expense of out-of-state dairy farmers, local consumers, and wholesalers. The mechanism of economic protectionism is an assessment imposed at the wholesale level on all milk sold within the state, including milk produced out-of-state. That assessment is then deposited into a separate

fund and rebated to in-state dairy farmers only, despite the fact that most of the state's milk is produced by out-of-state dairy farmers. The precise question here is whether a state pricing order upheld by the Massachusetts Supreme Judicial Court, despite a finding that the pricing order burdens interstate commerce, violates the Commerce Clause of the United States Constitution.

### I. THE PETITIONERS' BUSINESSES

The Petitioners, West Lynn and LeComte's, are Massachusetts licensed milk dealers who sell milk and related dairy products on the wholesale level in New England. Approximately ninety-seven percent of West Lynn's and LeComte's milk is purchased from dairy farmers in New York and Maine; less than three percent of their milk is purchased from Massachusetts dairy farmers. West Lynn and LeComte's purchase their milk from out-of-state dairy farmers who compete with Massachusetts dairy farmers. West Lynn and LeComte's compete with other milk wholesalers, some of whom purchase a substantially larger percentage of their milk from Massachusetts dairy farmers.

### II. FEDERAL REGULATION OF THE MILK INDUSTRY

Milk that is produced by dairy farmers in one state is often sold to wholesalers in another. To reduce the risk that interstate rivalries may jeopardize the flow of a fresh supply of milk, marketing dairy products throughout the United States has been subject to federal regulation. In 1937, in response to intense competition between dairy farmers in various states, the Agricultural Marketing Agreement Act (the "Act") 7 U.S.C. §§ 601 *et seq.*, was passed. The Act authorizes the Secretary of

Agriculture (the "Secretary") to issue milk marketing orders setting minimum prices that processors, such as the Petitioners, must pay to dairy farmers for their milk. *Block v. Community Nutrition Institute*, 467 U.S. 340, 341 (1984) citing 7 U.S.C. §§ 601 *et seq.* The essential purpose of the Act is to raise producer prices to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers in each state in each region of the country. *Block v. Community Nutrition Institute*, 467 U.S. at 340 citing S. Rep. No. 1011, 74th Cong. 1st Sess. 3 (1935); *see also, Nebbia v. New York*, 291 U.S. 502, 517-518 (1934).

Each of the marketing areas covered by the federal marketing orders encompasses several states. Each area is designed to include milk distributors who compete with each other in the sale of milk. *See The Federal Milk Marketing Order Program*, Marketing Bulletin No. 27 at 19 (1989). For many years, the Secretary has issued and enforced one milk marketing order for virtually all of New England — New England Federal Milk Marketing Order No. 1 ("Order No. 1"). The Order No. 1 marketing area includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire.

The Act's minimum price regulation across state lines reflects the interstate nature of commerce in the milk industry. Throughout the United States, milk is regularly exported from the less populated states into the more densely populated states. Of the six New England states, only the two most sparsely populated — Vermont and Maine — are "export states." Dairy farmers within those two states produce far more milk than is consumed there. The excess milk is exported across state lines and sold to milk wholesalers, such as the Petitioners, who package milk for consumers in the more densely populated New England states. Massachusetts is an import state: it only produces about thirty-five percent of all of the milk products, and ten percent of the fluid milk, sold in the state.



In setting minimum prices, the market administrators from each region must consider economic conditions in *all* states within the region. No provision in a marketing order may favor dairy farmers in one state over dairy farmers in other states. See 7 U.S.C. § 608c(18).

Nothing in the Act expressly precludes a state from supporting its dairy farmers. Nor does the Act preclude a state from setting minimum prices above the federal minimum price. The problem in this case is that Massachusetts has structured its law so as to discriminate against out-of-state dairy farmers and those who purchase milk from them. This discriminatory scheme creates a problem for the nation, not only because of the Commerce Clause, but also because the Congress has recognized that the marketing of milk, unlike the marketing of other products, is a matter of national concern.

### III. THE PRICING ORDER

On January 28, 1992, the Commissioner of the Massachusetts Department of Food and Agriculture declared the existence of a state of emergency. (A-56, 57). The essence of the declaration was that Massachusetts dairy farmers are going out of business because they cannot compete successfully with dairy farmers in other New England states. (A-53). On the basis of that declaration, the Commissioner issued a pricing order (the "Pricing Order"). (A-41).

The Pricing Order does more than establish a minimum price to be paid by milk wholesalers to Massachusetts producers above the federally established minimum milk price.<sup>3</sup> If the

<sup>3</sup>The price differential between the Order No. 1 minimum price and the Massachusetts minimum price will be referred to as the "Premium." The Premium to be paid by each processor is based on the difference between \$15/cwt and the Order No. 1 blend price for milk multiplied by the amount of Class I milk the dealer sold in Massachusetts during the previous month, divided by three. (A-44, 45).

Commissioner had raised the price of Massachusetts produced milk and taken no other protectionist action, the Massachusetts dairy farmers would have been left to the mercy of out-of-state competitors who could sell milk below the Massachusetts price. Milk wholesalers would naturally be inclined to buy lower priced raw milk from farmers in neighboring states. The Commissioner, therefore, had to design a pricing scheme that would permit his local dairy farmers to benefit from a higher price without suffering the market consequences of charging a higher price.

The Pricing Order's structure, therefore, is made elaborate and cumbersome for one purpose — to protect local dairy farmers from interstate competition. First, the Premium is not paid by the milk wholesalers directly to the Massachusetts farmers. Instead, the Pricing Order requires milk wholesalers, whether located in or out of the Commonwealth, to pay a monthly "assessment" to the Commissioner based on the amount of Class I milk sold for consumption in Massachusetts, even if the milk wholesaler purchased its raw milk from out-of-state dairy farmers. (A-45). Second, the assessments collected by the Commissioner are not deposited into the General Fund of the Commonwealth of Massachusetts. Instead, the Commissioner deposits the assessments into a separate fund, the Massachusetts Dairy Equalization Fund (the "Fund"). (A-47). Finally, the amounts paid into the Fund are distributed to Massachusetts dairy farmers based on each farmer's pro-rata share of the Massachusetts market. (A-44, 46). Significantly, no monies are distributed to out-of-state dairy farmers, despite the fact that most of the money paid into the Fund is derived from the sale of out-of-state milk. During the months of May through September, 1992, the Massachusetts dairy farmers received approximately \$3 million from the Fund. This war chest was used to bolster the economic position of Massachusetts dairy farmers, which in turn would dull the competitive edge of the more efficient dairy farmers in other states.

#### IV. THE PROCEEDINGS BELOW

On July 23, 1992, the Petitioners filed this civil rights action pursuant to 42 U.S.C. § 1983 in the Massachusetts Superior Court. *West Lynn Creamery, Inc. et al. v. Commissioner of the Department of Food and Agriculture*, C.A. 92-4610-G.<sup>4</sup> The Petitioners contended that the Pricing Order violates the Commerce Clause of the United States Constitution because it discriminates against interstate commerce. The Petitioners argued that the Pricing Order is a *per se* violation of the Commerce Clause because it is both discriminatory in purpose and discriminatory in practical effect. The Petitioners sought declaratory and injunctive relief in the Massachusetts Trial Court. Preliminary relief was denied. (A-21). The Petitioners appealed to the Massachusetts Appeals Court which granted relief in a temporary order. (A-17). On December 21, 1992, the case was transferred, *sua sponte*, to the Massachusetts Supreme Judicial Court.

In reviewing the Pricing Order, the Massachusetts Supreme Judicial Court recognized that the Pricing Order was designed to "aid" the Massachusetts dairy farmers. *See West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture*, 415 Mass. at 16, 611 N.E.2d. at 243 (A-10). The court also recognized that the Pricing Order burdens interstate commerce. *Id.* at 17, 611 N.E.2d. at 244 (A-11). The court, however, rejected the Petitioners' Commerce Clause challenge holding that while the Pricing Order burdens interstate commerce, the in-state benefits from the Pricing Order outweigh its "incidental" burdens. *Id.* at 19, 611 N.E.2d at 245 (A-11).

<sup>4</sup>On November 18, 1992, the Petitioners also filed separate actions in the Massachusetts Superior Court seeking review of the Commissioner's Decisions revoking their milk dealers' licenses. *West Lynn Creamery, Inc. v. Watson*, Civil Action No. 92-6914G; *LeComte's Dairy, Inc. v. Watson*, Civil Action No. 92-6924G. On December 11, 1992, a Superior Court judge reserved and reported these cases to the Massachusetts Appeals Court. On December 15, 1992, the Massachusetts Appeals Court consolidated the cases with Petitioners' civil rights action.

Relying on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the court concluded that the Pricing Order does not violate the Commerce Clause because the burden imposed on interstate commerce is not clearly excessive in relation to the putative local benefits. *Id.*, 611 N.E.2d. at 245 (A-13).

Subsequently, on June 9, 1993, the Massachusetts court entered an Order staying the issuance of its rescript pending this Court's determination of the constitutionality of the Pricing Order. (A-15).

#### REASONS FOR GRANTING THE WRIT

The decision of the Massachusetts Supreme Judicial Court warrants review by this Court for three compelling reasons. First, the issue raised by this case — whether a state may create protectionist laws in the dairy industry which adversely affect interstate commerce — is a recurring issue of national significance that merits consideration by this Court in its own right. Second, whether state pricing orders are constitutional has given rise to a clear conflict among the state and federal courts that only this Court can resolve. Finally, the Massachusetts court's resolution of this issue is in clear conflict with prior decisions of this Court, and if left undisturbed, would undermine the constitutional restraints delineated by this Court regarding a state's power to regulate interstate commerce in the dairy industry.

#### I. THE OPINION BELOW RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE WHICH ARE UNLIKELY TO BE SATISFACTORILY RESOLVED BY THE COURTS.

Over the years, there has been persistent conflict between the states regarding the regulation of milk prices in the United



States. As the milk industry is highly competitive, states have sought to find ways in which to help their local farmers and prevent out-of-state competitors from gaining an advantage when lower costs and more efficient production threaten their in-state businesses. This Court has been consistently asked to resolve these conflicts, and to provide guidance to the states as to the constitutional parameters of their ability to exercise their police powers to protect their local dairy farmers by regulating the price, distribution, and supply of milk. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Milk Board v. Eisenberg Co.*, 306 U.S. 346 (1939); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Nebbia v. New York*, 291 U.S. at 502.

In the early 1930's, several states in the Northeast enacted state milk control laws to protect their local dairy farmers. These laws regulated the price, supply, and distribution of milk to increase the returns received by local dairy farmers above the federal market orders. In *Nebbia v. New York*, this Court upheld the state's power to protect the health and welfare of its citizens by regulating the distribution and price of milk produced *within* the state. *Nebbia*, 291 U.S. at 502 (emphasis added). The nature and extent of the regulation permitted, however, is limited by the Commerce Clause of the United States Constitution. See, e.g., *Baldwin v. G.A.F. Seelig*, 294 U.S. at 511.

The seminal case restricting the state's power to regulate the milk industry is *Baldwin*. In *Baldwin*, this Court held that a state, in the sole interest of protecting its dairy farmers, could not insulate its in-state milk industry from competition from other states. There, New York had established minimum milk prices to be paid by milk dealers to producers above the

federal market order price. For products originating within the state, this Court did not take issue with New York's minimum price law.<sup>5</sup> Instead, it focused on that portion of the New York law which fixed a minimum price for milk which was imported from other states.

New York's purpose in extending its minimum price laws to milk produced in other states was to insulate local farmers from competition from neighboring states. Without that portion of the law, New York milk dealers would be encouraged to buy their milk out-of-state to avoid paying the artificially high in-state milk prices created by the statute. In effect, New York artificially raised the price of out-of-state milk so that out-of-state producers could not underprice the local product.

The *Baldwin* Court struck down New York's statutory scheme because the law unconstitutionally removed any economic incentive for a local distributor to purchase out-of-state milk and thereby encouraged its distributors first to consume the local supply of milk before turning to out-of-state sources. *Baldwin*, 295 U.S. at 511. Thus, the Court reasoned that out-of-state milk producers were denied an opportunity to compete with New York produced milk. *Id.* The Court concluded that New York's law set a barrier to traffic between one state and another in violation of the Commerce Clause. *Id.* at 521-522.

The *Baldwin* Court also specifically held that legitimate state power to regulate commerce for health and safety reasons could not be invoked to validate New York's price regulation. There, the Court would not accept state arguments concerning the preservation of the quality of milk as a guise for the protection of the economic welfare of the state's milk industry. The *Baldwin* Court stated:

<sup>5</sup> The Petitioners do not contest the state's power to fix minimum prices for products originating with the state. Such regulations have been held to be constitutionally valid. *Nebbia v. New York*, 291 U.S. at 502.



If New York in order to promote the economic welfare of her farmers, ~~may~~ guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

*Id.* at 522. In other words, to allow the individual states to implement such regulations would open the door to state sponsored pricing wars, which is one circumstance that the Commerce Clause was designed to guard against. *See id.*

Since *Nebbia* and *Baldwin* were decided more than 50 years ago, this Court has continually intervened to define the constitutional boundaries of the state's power to protect its dairy industry consistent with the Commerce Clause. In numerous instances, this Court has held that states have exceeded their power, and therefore, has been compelled to strike down state statutes as violative of the Commerce Clause. *See, e.g., Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. at 361; *Dean Milk Co. v. Madison*, 340 U.S. at 349; *Hood & Sons v. Du Mond*, 336 U.S. at 525.

The economic downturn of the 1990's has triggered a flurry of activity from a number of states to implement price support systems to increase the returns that the states' local dairy farmers receive for their milk. Here, the state of Massachusetts has again tested the boundaries of the Commerce Clause by implementing a regulation which neutralizes the economic effects of free competition between the states. Once again, this Court's guidance is necessary to define the constitutional parameters of a state's ability to protect its local milk industry from the logical consequences of a free market.<sup>6</sup>

<sup>6</sup>The importance of this Court again reinforcing the vitality of the Commerce Clause is particularly timely as Europe continues to struggle towards a free market through the European Economic Community and the United States, Canada, and Mexico consider final approval of the North American Free Trade Agreement.

## II. THE DECISION BELOW CLEARLY CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS REGARDING WHETHER STATES MAY IMPLEMENT PRICING ORDERS TO PROTECT THEIR LOCAL DAIRY FARMERS.

The perceived problem of the inadequacy of the minimum prices set by the federal marketing orders is not peculiar to Massachusetts. New York, Minnesota, and Maine<sup>7</sup> have all implemented state pricing orders regulating the price of milk, and other states are contemplating instituting similar pricing orders to protect their own in-state farmers. While the Massachusetts court has proclaimed these pricing orders constitutional, New York and Minnesota federal courts have struck them down as violative of the Commerce Clause of the United States Constitution in accordance with *Baldwin*. *See Marigold Foods v. Redalin*, 809 F. Supp. 714 (D.Minn. 1992); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992).

In holding the Massachusetts Pricing Order constitutional, the Massachusetts Supreme Judicial Court has created an irreconcilable conflict with other decisions of the federal courts. *Compare West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture*, 415 Mass. at 8, 611 N.E.2d. at 239 with *Marigold Foods v. Redalin*, 809 F. Supp. at 714; *Farmland Dairies v. McGuire*, 789 F. Supp. at 1243.

In *Marigold Foods*, a federal court relying on *Baldwin* held that a Minnesota pricing order nearly identical to the Massachusetts Pricing Order was a *per se* violation of the Commerce Clause.<sup>8</sup> Similarly, in *Farmland Dairies v. McGuire* a federal district court, relying on *Baldwin*, invalidated a law similar to the Pricing Order. In that case, a New York state regulation established a minimum price for New York produced milk,

<sup>7</sup> *See Opinion of the Justices*, 601 A.2d 610 (Me. 1991).

<sup>8</sup> The Massachusetts court did not attempt to distinguish the *Marigold Foods* case, and as a result, reached the erroneous conclusion that the Pricing Order does not violate the Commerce Clause.

and required dealers of non-New York milk to make "compensatory" payments for milk purchased at a lower price from dairy farmers outside of New York if such milk was sold in New York. The compensatory payments were made to an equalization fund and then distributed to New York dairy farmers only. The stated purpose of the regulation was to "promote market stability, reduce violent price fluctuations, and better ensure the availability of a quality milk supply throughout the state." *Farmland Dairies*, 789 F. Supp. at 1253.

The dairies argued that since the major purpose of the compensatory requirement was to protect the New York dairy industry and to cancel out the economic advantage that lower-priced non-New York milk would otherwise have over New York-produced milk, it violated the Commerce Clause. Relying on *Baldwin*, the court struck down the regulation holding that the compensatory payment scheme was a *per se* violation of the Commerce Clause: the purpose and effect of the regulatory scheme favored in-state interests over out-of-state interests, and as such, burdened interstate commerce.<sup>9</sup> The court reasoned that the compensatory payments from dealers of non-New York milk allowed New York farmers to receive a higher

<sup>9</sup>The New York district court distinguished New York's unconstitutional milk pricing scheme from the constitutional "use tax" implemented in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). In *Henneford*, this Court concluded that the use tax did not burden interstate commerce because it did not create a preference for Washington goods. The *Farmland Dairies* court distinguished *Henneford*, noting that Washington's sales tax "went to the general coffers of the state, not to the Washington retailers. The imposition of the tax did not benefit Washington retailers affirmatively, but rather removed the disadvantage caused by the sales tax." *Farmland Dairies*, 789 F. Supp. at 1252. Unlike the tax in *Henneford*, New York's compensatory payments, like the assessments under the Pricing Order, were distributed to in-state dairy farmers only. The New York court reasoned that the payments from dealers of non-New York milk did more than equalize the playing field. New York farmers received a higher price for their milk and were protected from suffering a corresponding reduction in sales. The court concluded that such compensatory payments constituted an impermissible burden on interstate commerce. *Id.* This Court should also conclude that the assessments under the Pricing Order create a similarly impermissible burden.

price for their milk without suffering a corresponding reduction in sales:

that protection necessarily came at the cost of out-of-state farmers with lower-priced milk, because the incentive to dealers to purchase such milk for distribution in New York was reduced or eliminated.

*Id.* at 1252-1253. The court further held, relying on *Baldwin*, that the regulation's purpose of protecting the state's milk industry was not sufficient to overcome the corresponding burden imposed by the regulation on interstate commerce. *Id.* at 1254.

The effect and purpose of the New York regulation struck down in *Farmland Dairies* are identical to the Massachusetts Pricing Order and the statute in *Baldwin*. Like the New York regulation, the Pricing Order establishes a minimum price to be paid by milk dealers to Massachusetts farmers.<sup>10</sup> (A-41). The Pricing Order attempts to achieve this minimum price by requiring milk dealers to pay an assessment — the difference between \$15.00 and the Federal Order No. 1 price — into the Fund. (A-46). Like the New York statute, the Pricing Order requires distribution of these funds to in-state farmers only. (A-46, 47). Because the assessment is imposed on all milk sold in Massachusetts, milk dealers must pay the minimum Massachusetts price for all milk, even milk purchased out-of-state.<sup>11</sup>

<sup>10</sup>The Massachusetts court's observation that the "pricing order does not establish a minimum price milk dealers must pay for milk . . ." *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d. at 243 (A-10) is misleading. The fact is that the Pricing Order does effectively set the price: the market price goes to the dairy farmers and the Premium goes to the Fund. The market price plus the Premium equals the total price received by the Massachusetts farmers.

<sup>11</sup>The Massachusetts court attempted to distinguish *Farmland Dairies* in a footnote. *West Lynn Creamery, Inc.*, 415 Mass. at 18 n.14, 611 N.E.2d. at 245 n.14 (A-12). Contrary to the Massachusetts court's scant treatment of *Farmland Dairies*,



As the Minnesota and New York federal courts have indicated, the constitutional infirmity of these state pricing orders lies in the teachings of *Baldwin*. Given the interstate nature of milk marketing in the United States, it is essential that there be consistency between the states regarding whether these state pricing schemes are constitutional. If some states, but not others, are permitted to enact pricing orders which burden interstate commerce, there will be a disruption in the interstate milk market and federal law regulating the milk industry will be undermined. This Court's guidance regarding the state's power to regulate interstate commerce is therefore imperative.

III. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND, IF LEFT UNDISTURBED, WILL UNDERMINE ESSENTIAL CONSTITUTIONAL RESTRAINTS ON STATE REGULATION OF INTERSTATE COMMERCE IN THE DAIRY INDUSTRY.

This Court has held that a two-step analysis should be utilized in determining whether a state law or regulation violates the Commerce Clause. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). Where the statute regulates evenhandedly to effectuate a legitimate local public purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church*, 397 U.S. at 142. On the other

that case did not depend upon whether the New York law directly affected the supply of out-of-state milk. Rather, the New York court observed that the compensatory payments from dealers of non-New York milk allowed New York farmers to receive a higher price for their milk without suffering a corresponding reduction in sales. It was the elimination of the competitive advantage that non-New York farmers would have had but for the pricing order that swayed that court. See *Farmland Dairies*, 789 F. Supp. at 1252-1253. The Massachusetts court did not address this issue. See *West Lynn Creamery, Inc.*, 415 Mass. at 8, 611 N.E.2d. at 239 (A-1).

hand, if either a discriminatory purpose or discriminatory effect is discovered, this Court has applied a virtual *per se* rule of invalidity. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). State statutes that amount to "simple economic protectionism" are discriminatory in purpose and, therefore, are *per se* violations of the Commerce Clause. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 (1992).

The purpose and effect of the Pricing Order and the statute in *Baldwin* are identical. The explicit, unambiguous language of the Pricing Order<sup>12</sup> and the Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry reveal that the Commissioner's purpose in enacting the Pricing Order is economic protectionism and discrimination against competition in the Massachusetts milk market. (See Appendix D to this Petition at A-51). In his Declaration of Emergency, for example, the Commissioner states:

. . . the industry is in serious trouble and . . . we must act on the state level to preserve our local industry, [and] maintain reasonable minimum prices for the dairy farmers [to] thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

(A-57). The Commissioner stressed that "[i]f no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances." (A-55). The Commissioner concluded:

<sup>12</sup>The Pricing Order states: ". . . Massachusetts producers are facing an emergency situation due to [the] Federally set price. . . . The terms and conditions of the Order take into consideration . . . the amount necessary for all sectors of the industry to yield a reasonable return on their product." (A-41).

In order to alleviate the situation facing our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England.

(A-56). By ordering an assessment on all milk sold within Massachusetts, and rebating it to Massachusetts farmers only, the Pricing Order discriminates against out-of-state farmers and the wholesalers<sup>13</sup> who purchase from these farmers. The clear protectionist purpose of this transfer of millions of dollars to Massachusetts farmers is revealed by the cumbersome structure of the Pricing Order. That cumbersome structure — paying assessments into the Fund and then distributing the funds to the Massachusetts farmers — is deliberate. The Pricing Order is specifically designed to insulate Massachusetts dairy farmers from what otherwise would be lower priced out-of-state milk. It is precisely to establish this protectionist purpose that the Commissioner has built the cumbersome structure of his Pricing Order.

The Massachusetts court held that the Pricing Order is not a *per se* violation of the Commerce Clause, reasoning that the Pricing Order is “evenhanded in its application” because “[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the Fund.” *West Lynn Creamery, Inc.*, 415 Mass. at 15-16, 611 N.E.2d. at 243 (A-9). This even-handedness argument, however, was considered and rejected by this Court in *Baldwin*. In *Baldwin*, this Court recognized that New York had not attempted to “prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont. . . .” *Baldwin*, 294 U.S. at 521. This Court also recognized that the New York law was even-

<sup>13</sup> West Lynn and LeComte's, as previously stated, purchase ninety-seven percent of their milk from out-of-state farmers.

handed because it established the same minimum price for in-state and out-of-state milk. *Id.* This Court held, however, that the establishment of a minimum price applicable to out-of-state milk constituted an “unreasonable clog upon the mobility of commerce” because it attempted to protect in-state dairy farmers “from the cut prices and other consequences of competition.” *Id.* at 527. The Court concluded that the statute was unconstitutional because it “neutralize[d] the economic consequences of free trade among the states.” *Id.* at 526.

In light of *Baldwin*, the Massachusetts court's conclusion that the Pricing Order is “evenhanded” and therefore not a *per se* violation of the Commerce Clause is clearly erroneous. In fact, the out-of-state farmers, and the wholesalers who purchase from them, are in a worse position here than in *Baldwin*. In *Baldwin*, the Vermont farmers received the difference between the market price and the state minimum price. Here, that differential does not go to out-of-state farmers; it is paid over to the Massachusetts farmers instead. That exacerbates the constitutional problem.<sup>14</sup>

The Massachusetts court further reasoned that the Pricing Order is not a *per se* violation of the Commerce Clause because “[t]he end to be served [by the Pricing Order] is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers are unable to earn a living income.” *West Lynn Creamery, Inc.*, 415 Mass. at 19, 611 N.E.2d. at 245, citing *Baldwin*, 294 U.S. at 500 (A-15). The Massachusetts court surprisingly concluded that such an end is legitimate, despite the fact that the *Baldwin*

<sup>14</sup> The court below distinguished *Baldwin*, erroneously concluding that the Pricing Order “does not manifest any preference for in-state milk over out-of-state milk.” *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d. at 243 (A-10). The court's conclusion was based on “the manner in which milk dealers are called on to contribute to the Fund.” *Id.* at 15, 611 N.E.2d. at 243 (A-9). The Pricing Order's cumbersome structure, however, cannot shield it from being invalidated. The relevant inquiry is whether the Pricing Order is discriminatory in purpose or effect.

Court specifically held that a state may not protect its local dairy industry under the guise of ensuring the health and safety of its citizens. *Baldwin*, 294 U.S. at 521-522.

Concluding that the Pricing Order does not discriminate against interstate commerce on its face, the court instead applied the lesser standard of scrutiny approved in *Pike v. Bruce Church*, 397 U.S. at 142. *West Lynn Creamery, Inc.*, 415 Mass. at 19, 611 N.E.2d. at 245 (A-13). Applying the *Pike* balancing approach, the court held that the Pricing Order burdened interstate commerce, but that this burden was "incidental given the purpose and design of the program." *Id.* at 17-18, 611 N.E.2d. at 244 (A-11).

*Pike*, however, requires an inquiry into whether the Pricing Order could be achieved with a lesser impact on interstate commerce. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471 quoting *Pike*, 397 U.S. at 142. The Massachusetts court, however, disregarded this aspect of the *Pike* analysis, despite the fact that there are many ways the state could subsidize its in-state dairy producers without violating the Commerce Clause. For example, the state could provide dairy farmers with tax subsidies from the General Fund or tax relief in the form of reduced property tax or income tax payments. The state could also provide less direct relief by increasing state aid to finance research into more efficient means of dairy production. In addition, as the Petitioners argued below, the Commissioner could have simply raised the price that dealers pay for Class I milk to in-state farmers. *Baldwin* does not prohibit any of these activities.

Neither the Commissioner nor the Massachusetts court, however, considered the availability of any less restrictive alternative to the Pricing Order. Massachusetts simply cannot require out-of-state dairy farmers, and the wholesalers who purchase milk from them, to finance the subsidization of Massachusetts dairy farmers when there exist perfectly legitimate constitu-

tional alternatives that do not burden out-of-state producers or interstate commerce.

## CONCLUSION

Wherefore, the Petitioners West Lynn Creamery, Inc. and LeComte's Dairy, Inc. respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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July 13, 1993



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Appendix A.

S-6140 SUPREME JUDICIAL COURT

WEST LYNN CREAMERY, INC. & another<sup>1</sup>

vs.

COMMISSIONER OF THE  
DEPARTMENT OF FOOD AND AGRICULTURE  
(and two companion cases<sup>2</sup>).

SUFFOLK. January 6, 1993. – April 15, 1993.

PRESENT: WILKINS, ABRAMS, NOLAN, LYNCH,  
& GREANEY, JJ.

*Constitutional Law, Interstate commerce. Milk Control.*

A milk pricing order pursuant to G. L. c. 94A, §§ 10-12, issued by the Department of Food and Agriculture, did not discriminate against interstate commerce so as to violate the commerce clause of art. 1, § 8, of the United States Constitution, where the order, having as its purpose the preservation of the viability of the milk industry in the Commonwealth, was not discriminatory on its face; where the order was applied evenhandedly to in-State and out-of-State dealers; and where the regulatory burden it imposed on interstate commerce, by requiring all licensed milk dealers to contribute, according to a prescribed formula, to an "equalization fund" for distribution to Massachusetts producers, was merely indirect and incidental. [14-19].

<sup>1</sup> LeComte's Dairy, Inc.

<sup>2</sup> West Lynn Creamery, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6914-G (judicial review of license revocation); LeComte's Dairy, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6924-G (judicial review of license revocation).

CIVIL ACTIONS commenced in the Superior Court Department, one on July 24, 1992, and two on November 18, 1992.

Motions for preliminary injunctive relief were heard by *R. Malcolm Graham, J.*, and *John L. Murphy, Jr., J.*, respectively.

After the latter two cases were reported to the Appeals Court by *J. Harold Flannery, J.*, the proceedings were consolidated for hearing in that court. The Supreme Judicial Court transferred them on its own initiative.

*Michael L. Altman* (*Margaret A. Robbins* with him) for the plaintiffs.

*Eric A. Smith*, Assistant Attorney General, for the defendant.

The following submitted briefs for amici curiae:

*Robert J. Sherer & Francis A. DiLuna* for Massachusetts Farm Bureau Federation.

*Allen Tupper Brown* for Massachusetts Association of Dairy Farmers & others.

*Marshall M. Schribman* for Massachusetts Cooperative Milk Producers Federation, Inc.

*Steven J. Rosenbaum & Andrew I. Schoenholtz*, of the District of Columbia, & *Richard M. Zielinski, Neil V. McKittrick & Joshua M. Davis* for Milk Industry Foundation.

NOLAN, J. The plaintiffs, West Lynn Creamery, Inc. (West Lynn), and LeComte's Dairy, Inc. (LeComte), are milk dealers licensed by the Department of Food and Agriculture (department) pursuant to G. L. c. 94A (1990 ed.).<sup>3</sup> West Lynn is a

<sup>3</sup>The department defines a "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk."

domestic corporation with its principal place of business in Lynn. West Lynn purchases milk from producers and producer-cooperatives and sells in Massachusetts about sixty per cent of the milk purchased.<sup>4</sup> West Lynn purchases most of its milk from out-of-State producers. LeComte is also a domestic corporation with its principal place of business in Somerset. LeComte purchases all of its milk from West Lynn and sells it to retailers, convenience stores, nursing homes, and restaurants.

Under G. L. c. 94A, the Commissioner of the department is vested with wideranging powers to supervise and regulate the milk industry of the Commonwealth. § 2. Among other things, the Commissioner is empowered to issue licenses to milk dealers, § 5, and to establish minimum prices to be paid for milk "which will best protect the milk industry in the commonwealth and insure a supply of pure, fresh milk adequate to cover consumer needs." § 10. The Commissioner fixes the minimum price to be paid to milk "producers" by issuing an order. §§ 11, 12. The Commissioner is empowered to suspend or revoke the license of a milk dealer who fails to comply with department orders, rules, or regulations. §§ 6, 7. The root of the dispute in the present cases is the Commissioner's revocation of the plaintiffs' milk dealers' licenses due to their failure to comply with a pricing order. The plaintiffs contend that the pricing order violates the commerce clause of art. I, § 8, of the United States Constitution.<sup>5</sup> We disagree.

The order that is the subject of this case was issued by the Commissioner in response to the economic crisis facing dairy farmers in Massachusetts. The background to the issuance of the order is as follows. In November, 1991, a petition was

<sup>4</sup>The department defines a "producer" of milk as "any person producing milk from dairy cattle."

<sup>5</sup>The commerce clause provides that "congress shall have power to regulate commerce with foreign nations, and among the several states."

delivered to the department requesting that the Commissioner hold hearings regarding the state of the dairy industry in Massachusetts. See G. L. c. 94A, § 12. The Commissioner held public hearings in January, 1992, conducted subsequent investigations, and interviews, and thereafter declared that the Massachusetts dairy industry was in a state of emergency.<sup>6</sup>

On February 26, 1992, in response to this state of emergency, the Commissioner issued an amended pricing order, pursuant to G. L. c. 94A, §§ 10-12.<sup>7</sup> The pricing order sets forth a plan designed to boost the amount of money local dairy farmers — the producers — receive for milk above and beyond that required by the Federal program.<sup>8</sup> The pricing order requires milk

<sup>6</sup> The Commissioner declared that "an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens . . . the economy of our entire state, the enviable lifestyles we enjoy here, and the health of our consumers. . . ."

"The industry, nationwide, is in serious trouble, and ultimately a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry and its attendant benefits. While the dairy farmers receive prices for their product equal to those in 1978, the costs of producing milk continue to skyrocket out of their control. . . ."

"Dairying maintains hundreds of thousands of acres of open space and the scenic vistas on which our state's vital tourist industry depends. It generates millions of dollars into our economy in payroll, taxes and purchases, while providing a fresh and nutritious food product at a fraction of the price paid by consumers elsewhere in the nation and the world."

"Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem."

<sup>7</sup> The Commissioner's first order was issued on February 18, 1992. The amended order was issued "for technical, clarification purposes." The February 18, 1992, order is not at issue on this appeal.

<sup>8</sup> The preamble to the pricing order provides: "The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices. This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their

dealers to submit monthly reports and to contribute to the Massachusetts Dairy Equalization Fund (fund). The monthly reports require, among other things, each licensed milk dealer to report the amount of "Class I" milk sold for consumption in Massachusetts during the reporting period.<sup>9</sup> Each milk dealer's monthly contribution to the Fund is calculated by multiplying the volume of "Class I" milk sold during the reporting month, regardless of point of origin, by an "Order Premium."<sup>10</sup> The Commissioner distributes the fund to producers in proportion to the milk produced in Massachusetts during the preceding month. The pricing order took effect immediately. The first monthly report, covering April, 1992, was due May 25, 1992.

West Lynn and LeComte submitted reports for the periods April through July, 1992. The plaintiffs paid their premiums for April and May, but discontinued payments thereafter. On July 24, 1992, the plaintiffs filed an action in the Superior Court Department alleging, among other things, that the pricing order violated the commerce clause. They argued that the pricing order places out-of-State farmers at a competitive disadvantage because it subsidizes Massachusetts farmers but not out-of-State farmers, all of whom are selling milk in Massachusetts, and sought declaratory relief, damages, a preliminary injunction, and a permanent injunction to prevent the Commissioner from collecting the monthly premiums. On July 31, 1992, a judge in the Superior Court denied the plaintiffs'

product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk."

<sup>9</sup> The "Class I" designation refers to milk consumed as fluid rather than processed into other products, e.g., cheese.

<sup>10</sup> The pricing order establishes a target price for milk. The order premium is equal to one-third of the difference between the target price and the so-called "blend price" reported monthly by the United States Department of Agriculture. In the pricing order the Commissioner fixed the target price at \$15 a hundred pounds of milk (hundredweight or cwt.). Assuming that the federally mandated price is \$12 a cwt., the order premium would be \$1.



request because they had failed to establish irreparable harm. The judge also denied their request to deposit the required premiums with the court.<sup>11</sup>

Meanwhile, West Lynn and LeComte continued to dispute the legality of the pricing order, and failed to comply with its provisions. In June and July, 1992, the Commissioner initiated administrative action against both West Lynn and LeComte seeking to suspend or to revoke their licenses for failing to comply with the pricing order.

In response to the Commissioner's action, on August 7, 1992, plaintiffs filed an "emergency" motion for a preliminary injunction seeking the same relief that the earlier motion sought: a preliminary injunction enjoining the Commissioner from imposing any penalty, including but not limited to, suspending or revoking their milk dealers' licenses for failure to pay the equalization premiums required by the Commissioner's amended pricing order. On August 14, 1992, the judge denied the requests for preliminary injunctive relief because the plaintiffs again failed to demonstrate any irreparable harm. The judge held that payment into the fund does not constitute irreparable harm because the pricing order does not require the plaintiffs to absorb the cost of the equalization premiums. Rather, the judge reasoned, the plaintiffs can pass on the equalization premiums to consumers. The judge also noted that, if the Commissioner should suspend or revoke the plaintiffs' licenses, his decision is reviewable, G. L. c. 94A, § 8; hence, their claim was premature.

On September 14, 1992, the Commissioner held hearings, and on November 16, 1992, conditionally revoked the plaintiffs' licenses, see G. L. c. 94A, §§ 6, 7, for failing to comply

<sup>11</sup> The plaintiffs assert that, once the payments are paid into the fund and distributed to Massachusetts dairy farmers, there is no practical remedy for recouping the funds if the pricing order is found to be unconstitutional.

with the pricing order.<sup>12</sup> The Commissioner denied the plaintiffs' commerce clause challenge, stating, "[W]hile the [Pricing] Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied evenhandedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states."

On November 17, 1992, the plaintiffs filed a second emergency motion for a preliminary injunction requesting that the Superior Court enjoin the Commissioner from revoking their licenses. In an affidavit supporting its motion, West Lynn stated that it did not intend to comply with the conditions of the Commissioner's November 16, order. West Lynn also noted that, if it is not licensed to sell milk in the Commonwealth, more than 1,000 employees may be laid off. Additionally, on November 18, 1992, the plaintiffs filed separate actions in the Superior Court seeking judicial review of the Commissioner's decisions to revoke the plaintiffs' milk licenses, G. L. c. 94A, §§ 8, 21, and requesting stays of enforcement action pending judicial review.

On November 24, 1992, a Superior Court judge, in a consolidated order, amended on November 25, denied the plaintiffs' second request for an emergency preliminary injunction, and their request for a stay of the revocation action pending judicial review. The judge reasoned that the plaintiffs had failed to demonstrate a reasonable likelihood of success on the merits and that they would suffer irreparable harm. The judge wrote that the plaintiffs should "pay the assessment [premium] and seek an early hearing on the merits." The plaintiffs then

<sup>12</sup> The Commissioner conditioned revocation of the licenses on continuing non-compliance with the pricing order. The Commissioner's revocation order was effective fourteen days after issuance.

petitioned a single justice of the Appeals Court, G. L. c. 231, § 118, 1st par. (1990 ed.), seeking interlocutory relief from the Superior Court's denial of the emergency motion for a preliminary injunction. On November 25, 1992, the single justice issued an order staying the Commissioner's November 16, 1992, revocation orders pending further review. After a hearing on December 1, 1992, the single justice agreed to extend the stay beyond December 15, 1992, if the plaintiffs paid the amounts due under the pricing order for the months June, July, and August, 1992.

On December 11, 1992, another judge in the Superior Court, reserved and reported the plaintiffs' cases concerning judicial review of the Commissioner's revocation orders to the Appeals Court. See Mass. R. Civ. P. 64, 365 Mass. 831 (1974). On December 15, 1992, the Appeals Court granted a motion to consolidate the three cases.

To expedite the appeals, the parties agreed, with the assent of the single justice, to seek interlocutory relief from a panel of the Appeals Court pursuant to G. L. c. 231, § 118, 2d par. We transferred these cases to this court on our own motion, and we hold the pricing order constitutional.

The sole question facing us from the three appeals concerns the constitutionality of the pricing order. It is long established that, while a literal reading of the commerce clause evinces a grant of power to Congress, it "directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.*, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). If the Commissioner's pricing order discriminates against interstate commerce, either on its face or in practical effect, the burden falls on the Commissioner

"to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986), citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Justification supporting a discriminatory measure is subjected to strict scrutiny. *Id.* at 138, 144. In cases where the regulatory measure under study amounts to "simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." *Wyoming v. Oklahoma*, *supra* at 800, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

On the other hand, if the pricing order has only indirect or incidental effects on interstate commerce, it will be found to violate the commerce clause only if the burdens imposed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine v. Taylor*, *supra* at 138, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court has applied reduced scrutiny in such cases, but there is no clear line separating close cases on which scrutiny should apply. See *Wyoming v. Oklahoma*, *supra* at 800 n.12, and cases cited.

As one would expect, the plaintiffs contend that the Commissioner's pricing order is discriminatory on its face, and argue in favor of the application of strict scrutiny. The Commissioner contends that we should review the matter with reduced scrutiny because the pricing order burdens interstate commerce incidentally, if at all. We hold that the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally burdens interstate commerce. Our conclusion flows from the manner in which milk dealers are called on to contribute to the Fund.

All milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the fund. Accordingly, the pricing order does not favor in-State milk dealers to the detriment of its out-of-State competitors. In this regard, then, the pricing order is evenhanded in its design and effect.



The pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935). Rather, the milk dealer's premium, as required under the pricing order, is fixed only by the Commissioner's target price, the federally mandated price, and the amount of milk the dealer sells for consumption in Massachusetts. See *supra* at 11-12 & note 10. A milk dealer's required premium is independent of the price the milk dealer has paid for the milk or the milk's point of origin. In this way the pricing order does not manifest any preference for in-State milk over out-of-State milk.

The pricing order is not an attempt to promote the sale of Massachusetts milk to the detriment of out-of-State producers. On the contrary, milk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs. As noted above, the premium required under the pricing order is independent of the price paid for the milk or its point of origin.

Further, the plaintiffs argue that the pricing order denies out-of-State milk producers the opportunity to compete with in-State milk producers because out-of-State milk, if sold in Massachusetts, is subject to the Massachusetts premium. Assuming, without deciding, that the plaintiffs, as milk dealers, have standing to raise this challenge, the argument is without merit. For the reasons mentioned above, we are not persuaded that the pricing order provides milk dealers an incentive to purchase milk from in-State producers rather than from out-of-State producers.

The Commissioner's pricing order was designed to aid only Massachusetts producers. Indeed, Massachusetts producers are entitled to disbursements from the fund based on the volume of milk produced, to the exclusion of its out-of-State competitors. The plaintiffs contend that this discriminatory distribution plan burdens interstate commerce because it will cause less out-of-State milk to be imported into Massachusetts. As

Massachusetts farmers receive more and more money from the fund, the plaintiffs argue, Massachusetts producers will produce more milk, and local production will then constitute a greater percentage of the total milk sold in Massachusetts.

Again we assume, without deciding, that the plaintiffs have standing to assert such a challenge. We concede that the fund distribution scheme affects interstate commerce in this manner but it does so only incidentally. Contrary to the assumption underlying the plaintiffs' argument, it is clear from the Commissioner's "Report Subsequent to Public Hearing" on the state of the dairy industry in Massachusetts, that fund distributions represent an infusion of capital designed solely to save an industry from collapse.<sup>13</sup> Given the Commissioner's report and the balance of the record, we cannot say that fund distributions were intended, or would be sufficient, to expand and develop the Massachusetts dairy industry such that the Commonwealth would be less dependent on "foreign" milk producers.

This is not to say, however, that the fund distribution plan is without its adverse impact on interstate commerce. Common sense necessitates a contrary conclusion. The fund distribution scheme does burden out-of-State producers, to the extent that these producers are not entitled to receive fund disbursements, but we hold that the burden is incidental given the purpose and design of the program.

The plaintiffs' reliance on *Baldwin v. G.A.F. Seelig, Inc.*, *supra*, is misplaced. *Baldwin*, like the present case, involved

<sup>13</sup> The Commissioner found that the dealers' evidence did not support their claim that the order would affect the price out-of-State producers received from Massachusetts dealers. He further rejected the claim that the order would increase milk production by Massachusetts producers. He found that the record showed that Massachusetts producers had decreased production since the order had gone into effect. The Commissioner reasoned that the prediction of an increase of production was "speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers."



milk dealers and State regulation of milk prices. The *Baldwin* regulation, however, differs from that under study in the present cases. In *Baldwin*, the United States Supreme Court found unconstitutional a regulation that prohibited State licensed milk dealers from selling milk produced out-of-State unless the out-of-State milk producers were paid New York's minimum price for the milk. *Baldwin v. G.A.F. Seelig, Inc.*, *supra* at 519. Justice Cardozo wrote, "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Id.* at 522.

The constitutional infirmity in *Baldwin* was not New York State's desire to aid its farmers to the exclusion of out-of-State farmers but, rather, the protectionist nature of the regulation. While the pricing order in the present case was born of a similar concern for the dairy farmer, the support system that the Commissioner has promulgated, as discussed above, cannot fairly be said to be discriminatory or protectionist as was the one at issue in *Baldwin*.<sup>14</sup>

In the present case, "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income." *Id.* at 523, citing *Nebbia*

<sup>14</sup>The plaintiffs also direct our attention to *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1248 n.5 (S.D.N.Y. 1992), in support of its argument. To the extent that we can discern from the opinion, it is inapposite. *McGuire*, like the present cases, involved State pricing regulation of the milk industry. Like *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and with similar fate, the State involved was New York. The fact distinguishing *McGuire* from the present case is that the price New York State farmers were paid for milk "increased proportionately with the amount of non-New York Class I milk sold in New York." *Id.* at 1248 n.5. Thus the *McGuire* pricing order provided incentive for milk dealers to purchase milk produced in New York to reduce their milk purchasing expenses. As the *McGuire* court found, a regulatory scheme tilted in such a fashion to benefit in-State interests impermissibly burdens interstate commerce. *Id.* at 1254.

*v. New York*, 291 U.S. 502 (1934). Such an end is legitimate. See *Baldwin*, *supra* at 519. The power of the Commonwealth to regulate the milk industry within its borders is clear. See *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1251 (S.D.N.Y. 1992) (State is empowered to fix minimum prices for milk sold by dairy farmers within its borders), citing *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 378 (1964). The premiums required under the pricing order may have detrimental financial impacts on milk dealers such as West Lynn and LeComte, but those detrimental impacts alone do not in our view run afoul of the commerce clause. Rather, the premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay. The Commissioner's pricing order may have the unintended adverse effect of reducing the economic viability of milk dealing in Massachusetts. While this may be the case, relief is beyond our province.

In view of the merely incidental burden on interstate commerce, the end to which the pricing order is aimed, and the resultant benefit to the Commonwealth's dairy industry, we conclude that local benefits outweigh any incidental burden on interstate commerce and hold that the pricing order does not violate the commerce clause. We remand the cases to the Superior Court for action not inconsistent with this opinion.

*So ordered.*

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**APPENDIX B.**

**SUPREME JUDICIAL COURT FOR THE  
COMMONWEALTH OF MASSACHUSETTS**

1412 Courthouse,  
Boston, Massachusetts 02108  
(617) 557-1020

Michael L. Altman, Esquire  
Rubin and Rudman  
50 Rowes Wharf  
Boston, MA 02110

Re: No. SJC-06140

WEST LYNN CREAMERY, INC., & another

v.

**COMMISSIONER OF THE DEPARTMENT OF FOOD  
AND AGRICULTURE (and two companion cases)**

**NOTICE OF DOCKET ENTRY**

Please take note that on June 9, 1993, the following entry  
was made on the docket of the above-referenced case:

ORDER: Pursuant to the Standing Order dated March 29,  
1988, the Emergency Motion for Stay of Issuance of Rescript,  
Request for Oral Argument and Motion for Stay of Any Order  
(papers 9, 10 and 11), the Court has considered the motions  
and they are hereby allowed. The request for oral argument  
is denied.

Jean M. Kennett,  
Clerk

Dated: June 9, 1993

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To: Michael L. Altman, Esquire  
Eric A. Smith, Esquire  
Richard M. Zielinski, Esquire  
Atty. Steven J. Rosenbaum  
Allen Tupper Brown, Esquire  
Robert J. Sherer, Esquire  
Marshall M. Schribman, Esquire  
Atty. Daniel J. Smith

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-J-827

WEST LYNN CREAMERY, INC. and  
LeCOMTE'S DAIRY, INC.

vs.

COMMISSIONER OF MASSACHUSETTS  
DEPARTMENT OF FOOD AND AGRICULTURE  
(and two companion cases).

ORDER

These cases come before me under G. L. c. 231, § 118, par. 1. The petitioners seek relief from an order entered in the Superior Court on November 24, 1992, denying their motions for preliminary injunctions to stop the revocations on December 1, 1992, of their milk dealer's licenses. On November 25 I entered an order staying the revocations pending disposition of West Lynn Creamery's and LeComte's Dairy petition for review.

The threatened revocations were based on the failure of the two dealers to make payments for the months of June and July, 1992, into the Massachusetts Dairy Equalization Fund, established by an "Amended Pricing Order" entered February 26, 1992. This was an emergency order intended to infuse cash into Massachusetts dairy farms (producers), which were faced with the danger of extinction due to rising costs of production and falling Federal milk price-supports. The pay-



ments by milk dealers into the fund were to be based on a formula computed on the basis of a differential between a target price calculated to stabilize the market and the so called "zone 21 blend price" reported monthly by the United States Department of Agriculture, multiplying the difference by the amount of milk sold monthly for consumption in Massachusetts, calculated in pounds. The fund is distributed monthly to Massachusetts producers in relation to their monthly production (up to a 200,000 pound limit).

From an affidavit furnished by the Commissioner, it appears that dealers generally complied with the amended price order at the outset until West Lynn Creamery and LeComte's Dairy refused to make the payments due for June and July. The result was a shortfall in the fund for distribution in July and August. By October most dealers were refusing to pay their monthly assessments, and the fund is apparently now inoperative. The Commissioner entered orders on November 16 revoking the licenses of West Lynn Creamery and LeComte's Dairy for failure to make payments for June and July. The orders were not to take effect until December 1 and would not take effect at all if the two dealers were to make the required payments for June and July and were to file reports for the subsequent months, with the required payments, by December 1. On November 17 the dealers filed petitions for judicial review of the revocation orders under G. L. c. 94A, §§ 8 and 21, and, in conjunction therewith, sought the preliminary injunctive relief that was denied in the Superior Court.

The dealers' contention is that the pricing orders establishing the Equalization Fund are invalid under the Commerce Clause of the United States Constitution. They argue that they will suffer irreparable harm if they are made to pay their mandated assessments into the fund because the amounts paid in are distributed to producers by the fifth day of the succeeding month and will be unrecoverable as a practical matter. At the

hearing before me they offered to pay into court, to be held in escrow pending determination of their petitions for review, the amounts that were due through November 25, 1992, which apparently total \$367,343 in the case of West Lynn Creamery and \$11,732 in the case of LeComte's Dairy.

The escrow solution is not acceptable to the Commissioner or to the producers (as represented by various amici curiae, such as the Massachusetts Farm Bureau Federation and the Massachusetts Assn. of Dairy Farmers) in light of the emergency existing among the producers, most of which are small or small to moderate sized dairy farms, and in light of their position that the money was raised, in practical effect from Massachusetts consumers and is equitably owned either by them or by Massachusetts farmers (if the price order is valid) but in no event by the dealers, who, the producers contend, would receive a windfall because they have priced milk for Massachusetts consumption so as to recover the cost of the Equalization Fund assessments.

The only clear aspect of this complicated picture is that the public interest would best be served by the earliest possible resolution of the underlying Constitutional issue. The Equalization Fund is presently inoperative, and dairy farmers are being penalized unfairly if the Amended Price Order is valid and should be enforced. To empower the Commissioner to enforce the price order solves the farmers' problem but is unfair to both Massachusetts consumers and out-of-State producers if the entire pricing scheme is, as the dealers argue, unconstitutional. The continuing uncertainty is prejudicial to dealers, who must set current prices in ignorance whether they will ultimately have to pay the Equalization Fund assessments. A speedy determination of the underlying Constitutional is the fairest solution for all parties.

At the hearing the court discussed with counsel the possibility of an early resolution through the vehicle of an interlocutory

appeal under G. L. c. 231, § 118, par. 2, from the order denying the preliminary injunction. As the pending petitions for review are governed by Administrative Procedure Act principles, with little or no role for fact-finding by the court, such a resolution seemed plausible. In response to the court's request that counsel confer amongst themselves and advise the court, I have been informed that counsel for the parties are in agreement on such a course. They have suggested the following accelerated briefing schedule: the dealers' briefs will be submitted on December 9, 1992; the Commissioner's brief on December 17; and the dealer's reply brief, if any, by December 22. The court accepts this schedule and has set the case<sup>1</sup> down for argument at 10:00 A.M., Tuesday, December 29, 1992.

Pending resolution of the appeal, taking into account the likelihood of success on the merits and balancing the hardships and equities to all parties, the court declines (as did the Superior Court judge, Murphy, J.) to stay beyond December 15 the Commissioner's decisions in the license revocation proceedings, as those decisions apply to the assessments that were required to be paid for June (due July 25, 1992), July (due August 25), and August (due September 25), during which times the majority of the milk dealers were paying their assessments into the Equalization Fund. If those payments are made to the Department prior to December 16, the stay of the license revocation decisions that was entered in this court on November 25 will remain in effect pending determination of the appeal, subject to further order by the panel that hears the appeal.<sup>2</sup>

There was some confusion at the hearing concerning the status of certain persons and organizations other than West

<sup>1</sup> The court assumes, of course, that the appeal from the Trial Court's order denying the injunction has been filed and that the appeal will be entered in this court.

<sup>2</sup> For the sake of clarity, the court states (1) that it has placed no restriction on the Commissioner in the distribution of amounts paid to the Department for the Equalization Fund, and (2) that it is not at this time ordering that the assessments due for September and October be placed in escrow with the court.

Lynn Creamery, LeComte's Dairy, and the Commissioner of Agriculture. Prior to the hearing the court allowed several motions to file amicus briefs or memoranda. (These were received and the attorneys involved were heard in argument.) It was not the court's intention to allow any motion to intervene. Any such allowance is vacated. For purposes of the appeal this court will treat as parties only those who are parties in the Superior Court proceeding. However, all persons or organizations that were permitted to file amicus briefs in the single justice proceeding are hereby authorized to file amicus briefs in the appeal. Argument by amici will be in the discretion of the panel that hears the appeal. Rule 17 of the Mass. Rules of App. Procedure applies, except that amicus briefs may be filed up to and including December 22.

By the Court  
(Armstrong, J.),

Assistant Clerk

Entered: December 8, 1992.

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTIONSWEST LYNN CREAMERY, INC. and  
LeCOMTE'S DAIRY, INC.

vs. NO. 92-4610G

GREGORY C. WATSON, COMMISSIONER,  
MASSACHUSETTS  
DEPARTMENT OF FOOD AND AGRICULTURE

WEST LYNN CREAMERY, INC.

vs. NO. 92-6914G

GREGORY C. WATSON, COMMISSIONER

LeCOMTE'S DAIRY, INC.

vs. NO. 9224G

GREGORY C. WATSON, COMMISSIONER

MEMORANDUM AND ORDER DENYING  
INJUNCTIVE RELIEF

The plaintiffs process, package and/or sell milk under license of the Massachusetts Department of Food and Agriculture.

The defendant Watson is the Commissioner of the Department.

On January 28, 1992, the Commissioner, acting pursuant to G.L. c. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry and issued an Amended Pricing Order on February 26, 1992.

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Liquidization Fund. The amounts deposited are then distributed to dairy farmers in the Commonwealth.

For the purposes of this proceeding, the three (3) captioned cases will be considered as a single action.

The plaintiff West Lynn Creamery, Inc. (West Lynn) did not pay the assessment due on July 25, 1992 nor in the months thereafter. Neither did LeComte's Dairy, Inc. and some other milk dealers.

After notice, the Commissioner conducted a hearing on September 14 1992 and by a Decision dated November 16, 1992, conditionally revoked West Lynn's milk dealers license for failure to pay the assessment required by the Pricing Order. The license will be revoked on December 1, 1992 unless the assessment is paid.

The plaintiffs are requesting a preliminary injunction to enjoin the Commissioner from revoking West Lynn's and LeComte's milk dealers licenses on that date.

In its Petition For Review, West Lynn asserts that it does not intend to comply with the conditions imposed by the November 16, 1992 Order of the Commissioner because it believes that those conditions violate the Commerce Clause of the United States Constitution. It further states that if it is not licensed to sell milk in the Commonwealth after December 1, 1992, more than 1,000 employees may be laid off.

This position is confirmed by an affidavit of one of the principal owners and Executive Vice President for Sales and Marketing delivered to the court this morning.



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This is a choice West Lynn must make. A more reasonable approach might be to pay the assessment and seek an early hearing on the merits.

After considering the arguments, briefs and other well prepared submissions of counsel and studying the findings, declarations, orders and decisions of the Commissioner of the Massachusetts Department of Food and Agriculture, the plaintiffs have not demonstrated a reasonable likelihood of success on the merits or that they would suffer irreparable harm if injunctive relief was not granted.

**ORDER**

Accordingly, it is **ORDERED** that entry be made **DENYING** PLAINTIFF'S SECOND EMERGENCY MOTION FOR PRELIMINARY INJUNCTION dated November 17, 1992.

John L. Murphy, Jr.  
Justice of the Superior Court

**DATED:** November 24, 1992

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**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
No. 92-4610-G**

**WEST LYNN CREAMERY, INC.  
and  
LECOMTE'S DAIRY, INC.**

**vs.**

**GREGORY WATSON, COMMISSIONER OF THE  
MASSACHUSETTS DEPARTMENT OF FOOD AND  
AGRICULTURE**

**SUFFOLK, ss.**

**CIVIL ACTION  
No. 92-6914-G**

**WEST LYNN CREAMERY, INC.**

**vs.**

**GREGORY WATSON, COMMISSIONER OF THE  
MASSACHUSETTS DEPARTMENT OF FOOD AND  
AGRICULTURE**

**SUFFOLK, ss.**

**CIVIL ACTION  
No. 92-6924-G**

**LECOMTE'S DAIRY, INC.**

**vs.**

**GREGORY WATSON, COMMISSIONER OF THE  
MASSACHUSETTS DEPARTMENT OF FOOD AND  
AGRICULTURE**

**AMENDMENT TO MEMORANDUM AND ORDER**  
**DENYING**  
**INJUNCTIVE RELIEF ENTERED ON NOVEMBER**  
**24, 1992**

The fourth paragraph of the above mentioned Memorandum and Order is amended by striking the word "Liquidation" and inserting in place thereof the word "Equalization" so that the sentence reads:

**The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Equalization Fund.**

SO ORDERED.

John L. Murphy, Jr.  
Justice of the  
Superior Court

**DATED:** November 25, 1992

IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS:  
MD-9202, MD-9301, MD-9347

Arthur Pappathanasi  
President  
West Lynn Creamery, Inc.  
626 Lynnway  
Lynn, MA 01905

**DECISION**

Re: Dealer Name: West Lynn Creamery, Inc.  
Revocation of Milk Dealer License No: 191

**INTRODUCTION**

1. This decision is rendered after a full and fair hearing held in order to determine if there is cause to suspend or revoke the milk dealer's license of West Lynn Creamery, Incorporated. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that West Lynn Creamery, Inc., failed to comply with the Commissioner's Amended Pricing Order.

**JURISDICTION**

2. The Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

**PARTIES**

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Common-

wealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. West Lynn Creamery, Inc., (hereafter "West Lynn") is a company with a principal place of business located at 626 Lynnway, Lynn, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

### FINDINGS

5. A show cause hearing was held on September 14, 1992 to determine whether there was sufficient cause to suspend or revoke West Lynn's Massachusetts milk dealer's license.

6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9347, MD-9301, and MD-9202 dated September 9, 1992, incorporating by reference the earlier notices received by West Lynn, was received by West Lynn on September 9, 1992.

7. Based upon the testimony presented at the hearing, the following facts are found:

#### Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of

State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including West Lynn.

10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

#### Violations

11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month . . .", following the monthly reporting period.

12. On July 2, 1992, the Department received a May Monthly Reporting Schedule and required payment from West Lynn, due for the month of June. Pursuant to the Order, the May Monthly Reporting Schedule was due on June 25, 1992. West Lynn failed to attach the list of sales to other dealers and the May 1992 Federal Market Administrator's Form No. 1, as required by the Order.

13. On July 24, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the June Monthly Reporting Schedule



and payment were due on July 25, 1992. West Lynn failed to attach the list of sales to other dealers and the June 1992 Federal Market Administrator's Form No. 1, as required by the Order.

14. On August 26, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992, however, the Department considered that the Schedule was timely filed.

15. On August 31, 1992, West Lynn submitted amended Reporting Forms for the months of June and July, as well as the May, June and July Federal Market Administrator's Form No. 1, as required.

16. As of the date of the hearing, West Lynn failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.

17. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, West Lynn has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).

18. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.

19. West Lynn's failure to comply with the Order was a significant factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

20. West Lynn contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.

21. The defense offered by West Lynn fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

22. It appears that West Lynn bases its Commerce Clause defense on alleged discrimination between in-state producers and out-of-state producers. Assuming, without deciding, that West Lynn has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.

23. West Lynn's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the

record. This claim is based on the underlying assumption that Massachusetts farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly decreased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause the premiums paid to out-of-state farmers to decline is not supported by the evidence.

24. West Lynn also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

### CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

I. The milk dealer's license of West Lynn Creamery, Inc. is hereby revoked, effective on the fourteenth day following receipt of this decision, unless prior to that date West Lynn complies with the following:

A. files a completed monthly reporting schedule and submits an accompanying payments for the month of July, 1992; and

B. files completed monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

### RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(f).

### EFFECTIVE DATES AND PARTIES BOUND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

**Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.**

Signed this 16th day of November, 1992.

---

GREGORY C. WATSON  
COMMISSIONER

## IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS:  
MD-9303 and MD-9346

President  
LeComtes/All Star Dairy, Inc.  
PO Box 57/500 Wood Street  
Somerset, MA 02726

**DECISION**

Re: Dealer Name: LeComtes/All Star Dairy, Inc.  
Milk Dealer License No: 114

INTRODUCTION

1. This decision is rendered after a hearing held in order to determine if there is cause to suspend or revoke LeComtes/All Star Dairy, Inc.'s milk dealer's license. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that LeComtes/All Star Dairy, Inc., failed to comply with the Commissioner's Amended Pricing Order.

JURISDICTION

2. Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

PARTIES

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Commonwealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. LeComtes/All Star Dairy, Inc. (hereafter "Respondent") is a corporation which operates as a milk dealer, with a place of business in Somerset, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

FINDINGS

5. A show cause hearing was held on September 14, 1992 in order to determine whether there was sufficient cause to suspend or revoke Respondent's Massachusetts milk dealer's license.

6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9346 and MD-9303, dated September 9, 1992, incorporating by reference the earlier notices received by Respondent, was received by Respondent on September 9, 1992.

7. Based upon the testimony presented at the hearing, the following facts are found:

Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. c. 94A §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.



9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including Respondent.

10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

#### Violations

11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month . . .", following the monthly reporting period.

12. On June 29, 1992, the Department received a May Monthly Reporting Schedule, with the required payment, from Respondent, due for the month of May. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on June 25, 1992.

13. On July 25, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of June. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on July 25, 1992.

14. On August 4, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of July. Pur-

suant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992.

15. As of the date of the hearing, Respondent failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.

16. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, Respondent has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).

17. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.

18. Respondent's failure to comply with the Order was a contributing factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

19. Respondent contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.

20. The defense offered by Respondent fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly

to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

21. It appears that Respondent bases its Commerce Clause defense on alleged discrimination between in-state producers and out of state producers. Assuming, without deciding, that Respondent has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.

22. Respondent's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the record. This claim is based on the underlying assumption that Massachusetts' farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly decreased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause the premiums

paid to out-of-state farmers to decline is not supported by the evidence.

23. Respondent also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

### CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

I. The milk dealer's license of LeComtes/All Star Dairy is hereby revoked, effective on the fourteenth day following receipt of this Decision, unless prior to that date Respondent complies with the following:

A. submits a completed monthly reporting schedule and submits an accompanying payment for the month of June and July, 1992; and

B. submits completed monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

All submissions are to be made during business hours at the offices of the Department of Food and Agriculture, Room 2103, 100 Cambridge Street, Boston, Massachusetts.

RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(7).

EFFECTIVE DATES AND PARTIES BOUND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

**Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.**

Signed this 16th day of November, 1992.

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GREGORY C. WATSON  
COMMISSIONER

APPENDIX C.AMENDED PRICING ORDER

Pursuant to Massachusetts General Laws Chapter 94A Sections 10, 11, and 12, the Commissioner hereby Orders that each licensed milk dealer comply with the following Pricing Order:

**I. Preamble**

The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices.

This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk.

**II. Definitions**

A. The terms used in this Order shall be defined in accordance with M.G.L. c. 94 and 94A, and for the purpose of this Order, the following words shall have the following meanings:



Committee: The Massachusetts Dairy Industry Committee.

Dealer: any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer.

Dealer-retailer: a person who is a dealer and who also sells at retail the milk handled for sale, shipment, storage or processing within the Commonwealth.

Producer: any person producing milk from dairy cattle.

Producer-Dealer: a dealer who also produces a portion or all of the milk they handle.

Sub-dealer: any person who does not process milk and who purchases milk from a dealer and sells such milk in the same containers in which he purchased it, but shall not include a store.

### III. Massachusetts Dairy Industry Committee

- A. The Commissioner shall establish the Massachusetts Dairy Industry Committee to assist in administration of this Order, and advise the Commissioner on pursuit of a regional milk marketing strategy.
- B. The Commissioner shall request that a representative from each of the following sectors of the milk industry

participate on the Committee chaired by the Commissioner, or his designee: a dairy farmer, a co-operative representative, a milk dealer, a producer-dealer, a retailer, and a member of the Board of Agriculture. The Secretary of the Executive Office of Consumer Affairs or their designee, and the Secretary of the Executive Office of Economic Affairs or their designee may sit on the Committee as additional advisory members.

- C. Every three months, the Department shall submit a summary of the monthly reports and any other relevant information to the Committee to assist the Committee in its advisory capacity.
- D. The Committee may provide advice to the Commissioner regarding the implementation and administration of this section, and may provide the Commissioner with a biannual review of the dairy industry.

### IV. Monthly Reporting Schedules

- A. Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month, commencing with the month of May, for the reporting month of April.
- B. The Monthly Reporting Schedule shall be a form provided by the Department, which shall include, but not be limited to the following information:
  - (1) the amount, in pounds, of Class I milk sold for consumption in Massachusetts during the past month,

not including sales to another Massachusetts licensed dealer;

- (2) the amount, in pounds, of fluid milk received from each Massachusetts producer during the past month.
  - (3) the amount owed to the Fund as calculated according to the formula in paragraph V of this Order.
- C. Every Massachusetts producer who holds a valid certificate of registration, and does not ship milk to a milk dealer licensed by the Department, or to a co-operative, must provide the Department, by the twenty fifth day (25th) of each month, a statement of the amount of milk produced and sold during the previous month and proof of such amount.

## V. Pricing Order Fund

- A. Every dealer, as defined in this Order, is subject to payment into the Massachusetts Dairy Equalization Fund based on the initial sale of Class I milk in Massachusetts. In cases where the same milk is handled by more than one dealer, the dealer which is the final entity to handle said milk for wholesale or retail sale within the Commonwealth shall be deemed to be the dealer required to report such sales.
- B. In calculating the amount owed in paragraph IV. B. 3. of this Order, the following formula shall be used:

### (1) Calculation of the Order Premium

$$\frac{15.00 - \text{Blend}}{3} = \text{Order Premium}$$

where,

Blend = The blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 price for the second preceding month (i.e.: for the reporting month of April, use February Blend,) plus any state mandated premium.

### (2) Calculation of the Premium Payment

Order Premium  $\times$  Amount sold for Class I utilization, calculated in paragraph IV. B. (1) = Premium Payment.

## VI. Order Distributions

- A. The Commissioner, shall direct that monthly distributions from the Fund are made by the fifth (5th) day of each month, commencing with the month of June, in the following manner:
  - (1) Payment shall be made directly to every Massachusetts producer based upon their proportion of milk produced in Massachusetts according to the following formula:

$$A/E = W$$

$$F \times W = \text{amount distributed to the Massachusetts producer}$$

where,

A = amount, in pounds, produced by the producer for the reporting month, except that in no case shall the amount in "A" exceed two hundred thousand (200,000) pounds.

E = the total monthly sum, in pounds, of milk produced in Massachusetts.

W = proportion of producer's contribution to Massachusetts milk production

F = amount, in dollars, in the Order fund for the reporting month

- (2) In no case shall the distribution to the producer exceed the figure determined in (3) below.
- (3) The maximum distribution to the producer shall be determined by according to the following formula:

$$\$15.00 - \text{Blend} = T$$

$T \times A$  = maximum amount which can be distributed to the Massachusetts producer

Blend = the blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 for the second preceding month.

T = Target Differential

A = amount, in pounds, produced by the producer except that in no case shall this figure exceed two hundred thousand pounds.

B. All amounts received pursuant to this Order shall be distributed by the Commissioner for the purposes of this Order only and all amounts paid shall be distributed directly to Massachusetts producers, except those amounts returned to the licensed dealers in accordance with paragraph C, below.

C. After the Order amount has been distributed to every Massachusetts producer, the Commissioner shall direct that the remaining balance be distributed directly to the licensed dealers, based upon each dealer's proportionate contribution to the total fund on or before the fifth (5) day of the month.

D. Adjustments:

1. Whenever verification of reports or payments of any dealer discloses errors made in payments to or from the Fund, the Department shall promptly notify such dealer of any unpaid amount, and such dealer shall, within five (5) days, make payment of the amount so billed. Whenever verification discloses that payment is due from the Fund to any dealer, the Commissioner shall, as promptly as possible, direct that such payment be made.
2. Whenever the Commissioner is required to make payments to a dealer pursuant to the provisions of this Order, and any amount is due from the dealer to the Fund for the same payment period, the Commissioner may issue a credit to the dealer for the amount of the payment in lieu of the payment in order to balance the amounts owed.



## VII. Enforcement

- A. In the event that a producer or milk dealer provides false information or attempts to misrepresent information required pursuant to this section, or fails to pay the amounts owed in accordance with this Order, or fails in any other way to comply with the terms of this Order, the Department shall conduct a hearing in accordance with M.G.L. c. 94A section 6, to determine if suspension or revocation of the license is warranted.
- B. Any person found in violation of any provision of this Order shall be subject to civil or criminal penalties pursuant to M.G.L. c. 94A section 22.

## VIII. Miscellaneous Provisions

- A. Continuing Obligation of Dealers: Unless otherwise provided by the Commissioner upon termination of any or all of the provisions of this Order, such termination shall not:
  - (1) Affect, waive or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provisions of this order;
  - (2) Release or waive a violation of this Order occurring prior to the effective date of termination;
  - (3) Affect or impair any right or remedy of the Commissioner or of any other person with respect to any such violations.

- B. No dealer, including stores, shall unconscionably increase the price charged for Class I milk. The Commissioner shall continue to monitor the pricing structure of milk sold for Class I consumption within the state to determine if they are unconscionably excessive in response to this Order. Upon a determination by the Commissioner that any price is unconscionable, the Commissioner shall provide the dealer with an opportunity for a hearing in accordance with M.G.L. c. 94A section 6, and take appropriate action in accordance with said section.
- C. Continuing Power and Duty: If, upon termination of this Order, or any part thereof, there are any obligations arising hereunder, the final accrual or ascertainment of which require further acts by any dealer or by the Commissioner, the power and duty to perform such further acts shall continue.
- D. Liquidation: Upon the termination or suspension of this Order, the Commissioner shall dispose of all funds received pursuant to the provisions of this Order, in an equitable manner, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

## IX. Effective Dates

This Order is implemented pursuant to the emergency provisions of M.G.L. c. 94A and M.G.L. c. 30A section 2 and is effective immediately. The first Monthly Reporting Schedule shall be due by May 25th, 1992 for the reporting month of April 1992.

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The provisions of this section shall cease to be in effect in the event that price setting is established pursuant to an interstate dairy compact, approved by Congress.

Signed this  
26th day of  
February, 1992

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GREGORY C. WATSON  
COMMISSIONER

This Order amends the Pricing Order dated February 18, 1992, for technical, clarification purposes.

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**APPENDIX D.**

**FINDINGS AND DECLARATION OF STATE OF  
EMERGENCY IN THE MASSACHUSETTS  
DAIRY INDUSTRY**

**MASSACHUSETTS DEPARTMENT OF  
FOOD AND AGRICULTURE**

**Dated: January 28, 1992**

**REPORT SUBSEQUENT TO PUBLIC HEARING**

**I. Petition to Hold Public Hearings**

On November 13, 1991 a petition was delivered to the Department of Food and Agriculture, requesting that the Commissioner hold hearings regarding the state of the dairy industry in Massachusetts and declare that a state of emergency exists. The petition was filed pursuant to M.G.L. c. 94A section 12.

The petition and signatures were reviewed and it was confirmed that at least twenty five percent of the licensed producers of milk within the petitioning market areas signed the petition under the pains and penalty of perjury. In fact, approximately fifty percent of the state's dairy farmers signed the petition.

In response to the petition, the Commissioner held two public hearings this week. Based upon the information already available to the Department and the Report of the Special Commission dated May 1991, the situation warranted that the Commissioner also hold hearings pursuant to sections 10 and 11 of the statute, and ascertain what prices, terms and conditions relative to milk would be most beneficial to the public interest and would best protect the milk industry. Therefore, complete investigatory hearings were held in relation to the entire milk industry.

## II. Public Notice

Public hearings were conducted at the University of Massachusetts, Amherst on January 15, 1992; and One Ashburton Place on January 14, 1992 in order to hear and receive testimony from interested parties concerning the state of the dairy industry in Massachusetts.

Notice of the hearings was provided by the following methods:

Published in:

- *Daily Hampshire Gazette* on December 21, 1991.
- *Boston Herald* on December 21, 1991.

Filed with:

- Executive Office of Communities and Development
- Massachusetts Municipal Association
- Secretary of State, Regulations Division

Sent by first class mail or facsimile to:

- All licensed milk dealers
- Agri-Mark and Mass. Milk Producers Cooperatives
- Massachusetts Farm Bureau
- *Country Folks*

Approximately 260 people attended the public hearings: 83 people presented oral testimony; 86 submitted written testimony. Additionally, some 10,000 consumers from across the Commonwealth signed a petition calling for equitable returns for dairy farmers.

## III. Introduction

In May of 1991, a Special Commission to Investigate and Study the Dairy Industry in Massachusetts was appointed by the Governor. The commission held public hearings, met on several occasions and provided a written report to the General Court, which concluded that the Commonwealth's dairy farmers are facing a crisis. This report is attached and incorporated herein.

Since that time, little has changed to improve the situation confronting these farmers. In fact, the situation has only become more desperate. As during the previous hearings, no testimony was received indicating that a crisis does not exist. Evidence was presented from various sectors of the public, not only dairy farmers. Testimony was received from consumers, agricultural industries, economic and financial experts, environmental groups, milk dealers, sportsmen's associations, educators, other agricultural commodity groups, as well as state legislators from both political parties.

## IV. Investigation

Updates on Prices:

In 1990, the average federal blend price paid to Massachusetts dairy farmers (prior to deductions for trucking, cooperative dues, advertising allotments, stop charges, etc.) was \$14.67 per hundredweight (cwt), approximately 11.6 gallons. In 1991, the average blend price was only \$12.64. Given that the Special Commission's report estimated the average cost of production at \$15.50, and the current testimony supports this fact, our dairy farmers lost an average of \$2.86/cwt last year.

One of the farmers testified that his production of 240,000 lbs of milk per month translates to a loss of approximately \$6,864 each month. It is not surprising that our dairy farmers,



who not long ago were debt free, are no longer able to pay for feed for the cows, have been forced to mortgage homes which have been in their families for generations, are working twelve hours, seven days a week to operate at a loss while being forced to forsake such basic necessities as medical insurance for their families.

A prime example of the financial crisis facing Massachusetts dairy farmers is illustrated by the fact that one of the state's largest dairy producers, whose family farmed for three generations, were forced to auction their herd this past summer. They reported that during the past year alone, milk income was down twenty seven percent, representing a loss of \$134,540 in milk income. For both 1990 and 1991, even with a twenty three percent reduction in expenses, their expenses exceed their income resulting in net losses for the farm. Without a savings account, they would not have been able to survive and, not seeing an end to their losses, they chose to make the choice to sell.

The testimony is fraught with accounts of losses and pleas for immediate redress. As during the Special Commission hearings, the testimony stresses that the price farmers are paid for their product is approximately the same as in 1978. At the same time, the uncontrollable costs of production have continued to rise. The costs of health insurance, car insurance, home insurance, equipment, heating, electricity, education, worker's compensation, taxes, feed and food to name only a few expenses, have increased considerably since 1978.

"An Economic Analysis and Forecast of Massachusetts Dairy Farmer Exits," prepared by Professor Lass of the University of Massachusetts, predicts that without immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the report also predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture.

During the summer of 1991, an "Over Order" premium was established by the Commissioner. This Order, provided the dairy farmers with an average of \$.74/cwt over the blend price. Unfortunately, this pricing could not be maintained since New York was forced to discontinue its own over-order pricing. Since New York is by far the largest milk producer in the region, this action led to the collapse of the Massachusetts Over-Order. This type of stabilization remains necessary in order to ensure a continued production of a supply of fresh milk.

If no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances. In fact, Wisconsin farmers have petitioned the USDA to allow shipments of powdered milk to be trucked to states like Massachusetts, reconstituted, and treated as Class I fluid milk, despite significant losses of flavor and nutritional value during processing and shipping.

#### Update on other states' actions:

Since last year, the entire dairy industry has indicated that it is facing a disaster. New England states are pursuing every avenue possible to prevent the demise of their dairy farmers. Maine passed legislation placing a tax on milk, giving a portion to the farmers, a portion to the WIC program and a portion to fund the farmland preservation program. Vermont has eagerly been awaiting developments in other states, such as a regional interstate compact, while New York farmers may petition for another Over Order.

As each state is unique, Massachusetts needs to find a solution suitable to its dairy industry, recognizing that we are currently the largest fluid milk consuming state in the Northeast. While we continue to pursue a regional solution, the current situation cries for immediate action. Although we

acknowledge the milk dealers' desire for a regional pricing structure, we must ensure the survival of our indigenous dairy production while this avenue is aggressively pursued.

## V. Conclusion

In order to alleviate the situation facing the our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England. This system must also address the regional character of the flow of milk and the need to provide consumers with a high quality product at a reasonable price.

An "Over Order" assures the Massachusetts dairy farmer a price "over" the federally established price, based upon the unique circumstances facing each state. The Department should prepare regulations, in the nature of an Over Order, which would create a mechanism ensuring the Massachusetts dairy farm an amount "over" the federally regulated blend price for milk. The Department should provide the mechanism for payment, and all funds should be collected only on behalf of Massachusetts producers. Any excess should be returned directly to dealers, with no amount taken out for administration of the program.

In addition, every effort should be made to pursue a regional compact. Although this solution is a long term goal, requiring adoption of an identical compact in at least four states and congressional approval, Massachusetts, as a large consuming state, will play a pivotal role in the potential future of any such compact.

## COMMISSIONER'S DECLARATION OF EMERGENCY

As Commissioner of Food and Agriculture for the Commonwealth of Massachusetts I have determined that an emergency

of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens a cornerstone of our state's agricultural industry. I reach this conclusion after a series of investigatory hearings and reviewing testimony from farmers, consumers, and experts from various facets of this complex industry.

These findings confirm the conclusions reached last May by the Special Commission on Dairying. Today, however, the crisis is more serious and the need to act more pressing. Regionally, the industry is in serious trouble and ultimately, a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem.

Signed this 28th day of January 1992.

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GREGORY C. WATSON  
COMMISSIONER